NO. 43715-1-II

COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON, TACOMA

TRACY HELM,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF TRANSPORTATION,

Respondent.

BRIEF OF APPELLANT

Jack W. Hanemann WSBA #6609
JACK W. HANEMANN, P.S.
2120 State Ave NE, Suite 101
Olympia, WA 98506
360-357-3501

Bradley J. Drury, WSBA #36909
JACK W. HANEMANN, P.S.
2120 State Ave NE, Suite 101
Olympia, WA 98506
360-357-3501

Attorneys for Appellant

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A. INTRODUCTION

In 2004, on numerous occasions rockfall and debris impacted the westbound lanes of Interstate 90 (I-90) east of the snow shed on Snoqualmie Pass (Pass). Tom Badger (Badger), the State's chief geologist determined IN 2004 that this slope "poses a significant rockfall hazard to the westbound lanes." He recommended that the containment area behind the "Jersey barrier" be monitored and "cleaned regularly" (Ex 18) The area east of the snow shed was designated as Slope 1867. A concrete barrier extended 200 feet east of the snow shed and then terminated. East of this barrier there was only a sub-standard containment ditch to prevent rocks reaching Interstate 90.

In 2005, Mr. Badger assessed this slope, 1867, as a "high risk" and "high hazard" slope. Mr. Badger prepared a report to the Governor on the I-90 Snoqualmie Pass, assessing the various slopes, including Slope 1867. In the report on Slope 1867, Badger stated that "numerous rockfall impacts both westbound lanes numerous times per year" (Exhibit 13). The report described the effectiveness of rockfall ditches and concrete barriers on other high-risk slopes in the Pass. The trial court ruled Badger's report was not admissible on relevance grounds nor could it even be shown to Mr. Badger during trial to refresh his memory (RP 366-368).

On the evening of November 5, 2006, a small rock slide occurred on the westbound I-90 lanes at milepost 58 at the snow shed, which was reported by the Washington State Patrol (WSP) to the Washington Department of Transportation (WSDOT). The trial court ruled this evidence was also not admissible, holding that the slope where these rocks fell on I-90 was not identified as the same slope where Tracy Helm's collision occurred. WSP identified the address where the rock slide occurred as "W90 MP58" (Ex15 p.2).

On the morning of November 6, 2006, fifteen (15) hours later, Tracy Helm's motor home struck a large rock in the westbound lanes of I-90 east of the snow shed. WSP identified the address where this accident occurred as "W90 MP58." The same location of the car/rock crash fifteen (15) hours earlier (Ex 15 p.2).

In this action for negligence, Ms. Helm's primary contention is that the State had notice of the rockfall problem for a sufficient length of time and a reasonable opportunity to correct it. The Plaintiff contended the State was on notice that numerous rocks reached I-90 in the area of Slope 1867 since at least 2004. Plaintiff contended the State should have remedied the condition with several low-cost methods: a concrete barrier, a mesh screen on the slope, a rockfall fence, properly maintaining the catchment basin that was there, or having a combination of barriers and

basins. At no time did Plaintiff contend that State was negligent in failing to remediate Slope 1867.[1]

The trial Court not only refused to admit Badger's report which documented the success of concrete barriers and containment ditches on other slopes in the Pass, but ruled that Plaintiff's expert Henry Borden, could not testify regarding these interim solutions. Mr. Borden's testimony would have described to the jury reasonable responses to an admittedly "high risk" situation at Slope 1867.

B. ASSIGNMENT OF ERROR

1. The trial court erred in refusing to rule as a matter of law on the State's affirmative defense of deferred remediation of Slope 1867 and in submitting the issue to the jury.
2. The trial court erred in giving Instructions Nos. 13, 27 and the Verdict Form instructing the jury that the State is immune from liability in managing slopes along highways when the deferred remediation of Slope 1867 was not an issue at trial.
3. The trial court erred in not allowing Plaintiffs' expert witness Civil Engineer Henry Borden to testify regarding interim

[1] Slope 1867 was scheduled to be remediated in 2012-2013 period as part of the Keechelus Slope Remediation Project.

protective measures to prevent rocks from reaching the I-90 lanes of travel.

4. The trial court erred in not admitting Plaintiff's Exhibit 15 – the Washington State Patrol's log of a car/rock crash at Slope 1867, 15 hours before Plaintiff's collision.

5. The trial court erred in not admitting Tom Badger's report to the Governor on unstable slopes on the I-90 pass including Slope 1867 (Exhibit 13).

6. The trial court erred in giving Instructions Nos. 7, 8, 13 and 15 regarding comparative negligence when there was no evidence of contributory negligence, only speculation on the part of the trial court.

7. The trial court erred in giving Instruction No. 12 regarding superseding cause when there was no evidence of a superseding cause.

8. The trial court erred in giving Instruction No. 13 which inaccurately stated Plaintiff's claims, submitted comparative negligence and the State's exercise of policy level judgment in managing Slope 1867 as affirmative defenses.

9. The trial court erred in giving Instruction Nos. 21 and 23 regarding violation of the statute "driving at a reduced speed

when special hazards exist" when the only evidence was that the Plaintiff was driving at a reduced speed and there was no evidence the special hazard of "standing water" existed and/or contributed to this collision.

10. The trial court erred in refusing to allow lay witness testimony regarding Plaintiff's condition prior to this collision.
11. The trial court erred in refusing to admit Plaintiff's photos illustrating Plaintiff's activities as cumulative (Exhibits 24, 26 and 27) after Plaintiff had admitted only one photo (Plaintiff's Exhibit 25).
12. The trial court erred in not permitting Exhibit 13, the report prepared by Defense expert Tom Badger, to be shown to Mr. Badger to refresh his memory as to what he'd written.
13. The trial court erred in failing to give Plaintiff's proposed Instruction No. 2, Plaintiff's Claims Instruction and Plaintiff's Verdict Form.

C. STATEMENT OF THE CASE

Tracy Helm was born on April 5, 1971. She is a high school graduate with 1 ½ years of college. She was 35 years old at the time of the collision with the boulder on Snoqualmie Pass on November 6, 2006 (RP119). She married Chris Helm in 1993 and is the mother of 2 children

(RP 123). She was working for Head Start driving a school bus in 2006 (RP 122).

The weekend of November 6, 2006, Tracy had driven the family RV to Spokane for her niece's first birthday (RP 128). She was returning to Olympia, Washington on the morning of November 6th. She was in the right lane of I-90 because traffic was moving faster than she was. Her speed was between 55 and 60 miles per hour (RP 130). She had observed a highway reader board sign warning of water on the highway because of the recent rain (RP 130).

Slope 1867 abuts the Keechelus snow shed on the east side. It extends from mile post 58.150 to mile post 58.380 (Ex88, RP 402). It had concrete barriers next to the highway that extended approximately 220 feet east from the snow shed and then ended. (Ex 80, RP 322, 401). Drivers on I-90 westbound coming around a bend in the road have limited sight distance of 900 feet where Slope 1867 abuts the highway (Ex 88, PR 379). This Slope had a substandard catchment basin or ditch next to the highway (RP 380).

This particular slope had been the subject of concern for over two years before Tracy Helm's collision with the boulder. Mr. Badger, who in 2013 was the Chief Engineering geologist for the Washington Department of Transportation (WSDOT) had in March 2004 visited Slope 1867. This

was necessitated because of rockfall and debris reaching the roadway several times in the preceding weeks. Rocks up to the size of small boulders (basketballs) had fallen onto the westbound lanes of I-90 from Slope 1867. In an email dated March 17, 2004, Mr. Badger stated that the slope presented a significant rockfall hazard to the westbound lanes and recommended that the area of the catchment basin be cleared regularly to optimize this protection (Ex 18, RP 398-402).

In 2005, Mr. Badger conducted slope assessments on rockfall problem areas on Snoqualmie Pass. He then prepared a report to the Governor. Section two (2) of that report is an analysis of the I-90 corridor (Ex 13, RP 352-353). The narrative on each slope contained in that section was written by Mr. Badger (RP 368-369). The report contained information on the effectiveness of various protective measures such as rock containment ditches, wire mesh and concrete barriers on slopes in the I-90 Snoqualmie corridor (Ex 13, RP 352-3). Mr. Badger stated that in 2005 rockfall had reached the roadway at Slope 1867 more than one time per year (RP 398). In fact his report states "rockfall impacts both westbound lanes numerous times a year" (Ex 13 p. 41) (Emphasis added). However, Mr. Badger wasn't allowed to read his own report to refresh his memory as to what he'd written. He did a slope assessment dated 11/21/2005 (Ex 88). This assessment rated the rockfall frequency at 81.

This is the highest (worst) rating possible (RP 38, Ex 88). This report was published in January 2006 (RP 365).

The night before Tracy Helm encountered and collided with the boulder at milepost 58, a small rockslide was reported to WSDOT (Ex 15). This WSP report listed the slide at West 90 snow shed mile post 58. This report was sent to the WSDOT at 6:25 p.m. (Ex 15). The WSDOT relies on these reports to establish the number of accidents in the scoring sheet (RP 421-422 and Ex 88). Although authenticated, this Exhibit was not allowed into evidence by the trial court. The trial court ruled the slope where this rock slide occurred was not identified with sufficient specificity (RP 64). Tracy Helm's collision with the boulder was reported by the WSP at the same location, westbound I-90, mile post 58 as the rock slide (Ex 15). MP58 to 58.38 consisted of the snow shed and Slope 1867 (Ex 13). West of the snow shed, a concrete barrier extended which prevented any rockfall from reaching the highway. The slope east of Slope 1867 had been remediated (See Ex 13 p. 42 Status – mitigated).

Tracy Helm was not aware of any of the foregoing history nor was she aware that Slope 1867 was designated as a high-risk slope for rockfall reaching the highway. When Tracy came around a bend in the highway and saw the snow shed, she also saw something moving in the roadway in front of her (RP 131-132). A vehicle was in the lane next to her, so she

applied her brakes. The object was a large boulder that when struck, lifted up the front end of her RV and slammed the RV down (RP 132). After she moved to the side of the road she saw fragments of the boulder on the road. While parked there numerous other rocks came down and reached the shoulder of I-90 around her disabled vehicle.

Mr. Norris, a WSDOT highway maintenance employee, who was driving a snow plow, came by. Tracy observed him push fragments of the boulder off the highway (RP 132). Tracy and her children sat on the side of the road for quite a while (RP 132). She identified the location where she struck the boulder as mile post 58.31 (RP 135, Ex 23). The location where her RV came to rest was at mile post 58.23 (RP 136, Ex 28)

Mr. Norris came back in a pickup truck and gave Tracy and her children a ride to the Summit. While at the accident scene he said he picked up several football and basketball sized rocks and threw them into the ditch (RP 116).

The RV was totaled. Tracy suffered a low back injury which eventually required surgery for a herniated disc. Dr. Conrad, her treating doctor, testified at trial that the low back symptoms and the lumbar surgery in March 2008 were related to the collision with the boulder on November 6, 2006 on a more probable than not basis (RP 148-153).

Tracy brought suit against the DOT of the State of Washington. In her Amended Complaint she alleged negligence for DOT's failure to maintain the roadway in a reasonably safe condition (¶ VI) and for failing to warn motorists of the recent rockfall in the area of MP 58 (¶ VII) (CP 4-11). She did not allege the State was negligent in deferring remediation of the entire slope.

If there was any uncertainty on the court's part that the deferred remediation was not part of Plaintiff's cause of action, it should have been clear by the time the trial began. Plaintiff's expert, civil engineer Henry Borden, had filed two separate Declarations (CP 458-461, 501-502).

The first Declaration was in response to Defendant's third motion for Summary Judgment regarding Discretionary Immunity. In his Declaration, Mr. Borden set forth his expertise (which was not challenged), the history of Slope 1867 and the neighboring slope of rocks falling onto the freeway including lane closures caused by a slide in 2005. He further declared the fact that in Mr. Badger's report regarding Slope 1867 it states "Maintenance reported that rockfall impacts both westbound lanes numerous times per year," (Exhibit 13 was not allowed into evidence at trial), that Slope 1867 was deferred for remediation in 2010, that based on the videos of the area in 2005 and in 2007, there was a lack of adequate

maintenance of the rockfall ditch and that additional rockfall protection measures could be employed in the interim until the slope was remediated.

In Mr. Borden's second Declaration dated February 20, 2013, in response to Defendant's Motion that Mr. Borden lacked the expertise to discuss interim measures to protect users of the highway, Mr. Borden states ". . . this case is not about geology or the need for slope remediation. My anticipated testimony is in the area of interim solutions pending the deferred slope remediation" (CP 501-502).

At no time did Plaintiff claim that the State was negligent for deferring slope remediation and the foregoing Declarations clearly advised the court that Plaintiff's expert would not testify regarding the decision to defer slope remediation.

On March 19, 2013, after all the evidence had been presented, the trial court raised the issue of the State's affirmative defense of discretionary policy-making authority. Plaintiff's attorney stated, "That's the deferred slope remediation. We're not challenging that" (RP 635). Later, Plaintiff's attorney stated, ". . . We're not taking issue with that. That's my point" (RP 636). Again, Plaintiff's attorney stated to the court, ". . . Plaintiff's theory isn't challenging the state's executive discretionary prioritization of the various slopes. We're not questioning that. That wasn't in our – that wasn't in the complaint when this whole thing started.

And if you – all of our briefs on the summary judgment motions we kept pointing that out. That isn't our basic theory" (RP 638).

Plaintiff's counsel further advised the court that any jury verdict form that included discretionary immunity was objected to (RP 650).

The Court's Final Instructions included Instruction 13, Instruction 27 and a Verdict Form advising the jury the State of Washington was immune from liability for decisions determining basic governmental policy (CP 607-637). The State was allowed to inject an absolute affirmative defense when there was no contention by Plaintiff that the State was negligent in their decision to defer slope remediation.

The State moved in limine to exclude Plaintiff's expert Mr. Borden on the grounds that "slope information is so specific to the practice of geology and to geology" that only someone licensed in geology could testify about the slope (RP 9).

Plaintiff responded "this is not a geology case." The geology was determined by the State when Mr. Badger, the State's expert determined that Slope 1867 was a high-risk slope and the State knew rockfall frequently reached the roadway (RP 10-11). The Plaintiff then made an Offer of Proof to qualify Mr. Borden, a highway safety engineer, to testify about interim solutions which could have protected the highway from rockfall (RP 14-39). Following the offer of proof, the Court pointed out

that Mr. Borden was not testifying to the degree of danger the slope presented, but what could be done to reduce the risk (RP 53). After argument, the trial court ruled:

> "THE COURT: I'm prepared to allow him to testify based on his education and experience what are the appropriate remediations for this level of rating for an unstable slope, and then certainly the state could come in and present its own testimony as to whether or not those remediations were appropriate in this case. But it seems to me that the plaintiff should have given the opportunity to present that, and I don't see that that's outside his area of expertise"

(RP 47).

The State drafted an Order based upon the ruling severely limiting the scope of Mr. Borden's testimony. Plaintiff objected to the entry of the Order specifically to that sentence that read: "Slope remediation includes rock screens, rock scaling mesh and rock fencing." The court responded: "And I think the court's impression was that this witness was not qualified, at least from what I heard, is not qualified to speak to slope remediation per se, but could be qualified to speak to structures that would prevent an unstable hillside from interfering with a roadway. If counsel

agree with that understanding of slope remediation, then I think I can sign this order" (RP 219-220).

The court refused to strike the sentence that slope remediation includes the four (4) preventative measures listed (RP 220).

Mr. Badger, the State's expert, testified that slope remediation means full mitigation or doing a partial mitigation (RP 383). When one talks about rockfall ditches, that would be a protective device. Similarly, Mr. Badger defined rockfall fences, concrete barriers, wire mesh draped over a rock slope, and cable net which is more common on I-90 because the rocks are "pretty big up there," as protective devices (RP 386).

Mr. Badger further opined that the combination of rockfall ditch and concrete barrier have been effective in totally eliminating rockfall hazard (RP 386).

However, when Plaintiff attempted to have Mr. Badger testify as to whether some protective devices were more effective than others in preventing rockfall, the trial court refused to allow his opinion on the ground of relevance. In fact, Plaintiff's attorney wasn't even allowed to respond to the objection (RP 389).

After Mr. Badger testified and had defined protective devices to include rock mesh, rockfall fences, ditches and concrete barriers, the trial court ruled that slope remediation includes everything and anything

connected to the slope. Therefore, mesh nets draped on the slopes were connected to slope remediation and beyond a civil engineer's expertise (RP 428-431).

The court then in advance of Mr. Badger's testimony ruled that no reference could be made to protective devices used on other slopes (RP 432).

Finally, the court stated Mr. Borden couldn't even render an opinion on whether it would have been appropriate to use a protective device on Slope 1867 as it is "outside his area of expertise" (RP 448).

Mr. Borden testified that he was a civil engineer with a wide background in highway engineering. He had worked for DOT for twenty-five (25) years dealing with all aspects of highway design including highways with rock cuts, shoulders and ditches. His specialty area was highway engineering (RP 435).

Mr. Borden was familiar with and used concrete barriers "very frequently" (RP 438). He had been involved with rockfall ditches and rock fences. He worked with both types of protective devices (RP 438-439). Mr. Borden had a total of forty (40) years' experience working with these devices (RP 439).

When Mr. Borden was asked for his opinion whether the highway was adequately protected if rockfall was reaching it, he was not allowed to

answer. The court repeatedly stated Mr. Borden was not qualified to express an opinion as to the degree of risk presented by the hillside (RP 452-453).

The trial court's rulings severely limiting Mr. Borden's testimony was a significant departure from the trial court's ruling at the beginning of trial that Mr. Borden could testify about the appropriate devices to reduce the level of risk, "I don't see that as outside his area of expertise" (RP 47).

The Plaintiff then presented witnesses primarily describing Plaintiff's injuries. When Plaintiff tried to present a picture of Tracy's activities before the accident, those witnesses were limited by the court as to what they could describe (RP 463-464). The court even interposed sua sponte an objection itself (RP 489-490).

After completion of all the evidence, the trial court again addressed the issue of the discretionary immunity and allowed the State to inject it into Instructions 13, 27, and the Verdict Form.

In addition, the court also permitted a superseding negligence instruction and comparative negligence instructions frequently arguing the State's position for it (Nos. 7, 8, 13, 15, 21 and 23). Superseding negligence was not pled as an affirmative defense in the State's Answer (CP 12-19) (RP 654).

Finally, immediately prior to closing argument the trial court instructed Plaintiff not to argue that Mr. Borden opined that a Jersey barrier or any other device would have prevented rocks from entering the roadway (RP 682).

Mr. Borden had in fact testified that a concrete barrier should have been used to "stop rockfall before it got into the travel lanes" (RP 448).

D. SUMMARY OF ARGUMENT

The trial court erred as a matter of law in allowing the absolute immunity defense and in instructing the jury on this defense when Plaintiff's claim of negligence was limited to allegations of inadequate interim protection of users of I-90 and lack of proper warning. See *McClusky v. Handorff-Sherman*, 125 Wn.2d 1, 882 P.2d 157 (1994).

The trial court erred as a matter of law in severely limiting Plaintiffs expert, Mr. Henry Borden, from presenting his opinion regarding protective devices that could have protected the highway from rockfall reaching the roadway. ER 702 provides that a witness may be "qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Mr. Borden's training, education and practical experience working for DOT qualified him to discuss different means of rockfall protection. See *Palmer v. Massey-Ferguson, Inc.*, 3 Wn.App. 508, 476 P.2d 713 (1970).

The trial court compounded the foregoing errors by neither allowing the State's expert witness nor the Plaintiff's expert witness to testify to protective measures that worked in other areas of the I-90 corridor to prevent rockfall from reaching the roadway and in excluding Mr. Badger's to report the Governor on what had been done on other slopes and their effectiveness (Ex 13).

Moreover, the trial court's ruling erroneously allowing issues of comparative negligence and superseding cause to be submitted to the jury in the Instructions to the Jury contributed to an overall effect of generating extreme emphasis on the State's deefenses depriving Tracy Helm of a fair trial.

E. ARGUMENT

1) Standard of Review

This Court reviews errors of law *de novo*. *Dettick v. Garretson Packing Co.*, 73 Wn.2d 804, 812-13, 440 P.2d 834 (1968); *Lyster v. Metzger*, 68 Wn.2d 216, 220 412 P.2d 340 (1966).

If, after a *de novo* review of legal issues, this Court concludes that error occurred, it next considers whether it is reasonably probable that the error affected the outcome of the trial. *Dickerson v. Chadwell, Inc.*, 62 Wn. App. 426, 433, 814 P.2d 687 (1991), *review denied*, 118 Wn.2d 1011 (1992).

Arguably a misapplied court rule or rule of law can be reviewed on a *de novo* basis. *State v. Cauthron*, 120 Wn.2d 879, 846 P.2d 502 (1993).

The general test for abuse of discretion is "whether discretion is exercised on untenable grounds or for untenable reasons, considering the purposes of the trial court's discretion." *v. Snow*, 56 Wn. App. 499, 507, 784 P.2d 554 (1990).

2) The Trial Court Erred as a Matter of Law in Allowing the State to Present the Defense of Discretionary Immunity.

The State presented evidence that the decision to defer complete remediation of Slope 1867 was a high level decision of the Department of Transportation (RP 408-411). Plaintiff did not raise an issue that the decision to defer remediation was negligent in the Complaint, at trial or in argument.

The State presented no evidence that any high-level evaluations had been done regarding the interim protective devices Plaintiff alleged could have been used to protect motorists from the rockfall impacting I-90. In fact, Mr. Badger was asked by the AAG what's been done to address "this particular hazard of this slope?" [1867]. He answered "there has been no activities." He hastily added, "I should qualify that. . . I believe maintenance does clean the ditches there" (RP 412).

The State's affirmative defense of discretionary immunity was presented to the jury in Instructions 13, 27 and in the Jury Verdict Form. All three (3) instructions were objected to by Plaintiff. The instructions informed the jury that the management of slopes along roadways involved basic governmental policy and that the State is immune for decisions in which it is determining basic government policy. These instructions misled the jurors to believe the law in this case was that the State was immune from liability for activities involving slopes. The instructions certainly could confuse jurors into believing that maintaining the ditch or putting a concrete barrier in place were management decisions involving the slope and therefore the State was immune. The giving of these instructions was erroneous as a matter of law and prejudicial to Plaintiff.

Plaintiff's Amended Complaint did not allege that the State was negligent in their priority array decision to defer complete remediation of Slope 1867 (CP 4-11). The Plaintiff never contended at trial that the decision to defer remediation of Slope 1867 was negligent. Thus, as a matter of law the trial court should not have permitted the State to present this defense. What facts regarding this defense were in issue? None. Yet, the jury was instructed the management this slope was a policy decision for which the State of Washington is immune.

The discretionary governmental immunity exception to state liability was created by the Washington Supreme Court in *Evangelical United Brethern Church v. State*, 67 Wn.2d 246, 252, 407 P.2d 440 (1966). In *Evangelical*, the court provided a four part test to determine whether an act is discretionary. *Evangelical*, 67 Wn.2d at 255.

In *Evangelical, supra*, the Plaintiff had four contentions. Two of the contentions dealt with the State's decision to have an "open program" at Green Hill School in Lewis County. Those contentions involved the executive and administrative processes of government and did not subject the State to tort liability. However, the Plaintiff's third and fourth contentions were not barred and were decided on other grounds; to wit: lack of foreseeability and causation. Presumably, if Plaintiff's only contentions had been that the State was negligent (3) in assigning the boy to the boiler room detail, and (4) in failing to timely notify local law enforcement agencies of his escape the discretionary immunity defense would not have been discussed or allowed.

An examination of the claims made by plaintiffs in other cases where the State asserted the discretionary immunity defense finds that the defense is <u>not</u> a bar to claims not involving high-level executive decisions.

In *McCluskey v. Handorff-Sherman*, 125 Wn.2d 1, 882 P.2d 157 (1994) the Supreme Court held that the issue of inadequate highway

signage was not part of an executive discretionary decision program and the superior court's exclusion of the defense was not error.

Similarly in *Bender v. Seattle*, 99 Wn.2d 582, 664 P.2d 492 (1983). The court held the applicability of this defense is limited to high-level discretionary acts exercised at a truly executive level, (*Bender* at 588). Mr. Bender had sued the City of Seattle for false arrest, malicious prosecution, libel and slander. Therefore, the discretionary governmental immunity defense did not apply because the actions of the police were not executive level.

Finally, this Court in *Avellanado v. State of Washington*,167 Wa.App. 474, 273 P.3d 477 (2012) held the discretionary immunity defense did apply where plaintiff alleged the State negligently failed to timely install a median barrier on the SR 512 median. WSDOT had expressly considered whether to fund installing a median barrier on SE 512 and deferred installation because higher priority projects were selected first (*Avellanado* at 484). WSDOT's decision to defer installation of a median barrier is similar to WSDOT's decision to defer slope remediation in the instant case. Unlike the plaintiff in *Avellanado*, Plaintiff in the instant case did not allege that the deferment was negligent. *Avellanado* supports Tracy Helm's argument herein.

Plaintiff's proposed jury instructions did not include the State's discretionary immunity defense. These instructions should have been given to the jury because Plaintiff's negligence claims did not challenge the State's exercise of their policy-making function. The giving of the State's instructions Nos. 13, 27 and Verdict Form were error as a matter of law.

3) **The trial court committed reversible error in ruling that Plaintiff's expert was not qualified to testify regarding interim solutions pending the deferred remediation.**

The trial court misapplied ER 702, Testimony by Experts and Relevant Case Law. ER 702 states an expert may be qualified as an expert by knowledge, skill, experience, training or education. The trial court focused solely on education. The trial court held in essence that because Mr. Borden had a degree as a civil highway engineer and not in geology that he couldn't testify regarding what protective devices could have prevented rockfall from reaching the highway.

Mr. Borden was qualified based upon his knowledge, expertise, experience and training to testify about interim safety devices to prevent rockfall from reaching I-90. The trial court not only had the opportunity to hear Mr. Borden's qualifications both in Offer of Proof and before trial

and during trial, but by Declaration as well submitted to the trial court in response to the State's motion in limine (RP 430-445, CP 501-502).

Mr. Borden had previously been qualified as an expert in a rockfall case entitled *Palelek v. State of Washington*; Cause No. 97-2-01450-4 (CP 501).

Mr. Borden was and employee of WSDOT for twenty-five (25) years as a highway engineer. He had a wide and broad background in highway engineering in all phases from initial design to final construction. He was familiar with and used the Department of Transportation's Design Manual, the same manual Mr. Badger referred to in describing the appropriate construction of a rockfall ditch (RP 389-391). Mr. Borden had experience in working with both rock cuts and soil cuts. In addition, he'd worked with Ed Stevens & Associates Engineering with over fifteen (15) years of performing engineering studies in support of litigation. He testified he was familiar with protective devices to prevent rocks from coming onto the highway and had dealt with them "very frequently" (RP 438). Specifically, in his forty (40) years of experience he had worked with concrete barriers, rockfall ditches and rock fences (RP 434-439). Later, Mr. Borden testified he worked many times with concrete barriers to prevent objects coming out

on the roadway (RP 449). He'd received on-the-job training, good familiarity with design manuals and design practices (RP 449).

Further, Mr. Borden, while with WSDOT, had taken a course in rock slope engineering, worked on Aberdeen Bluff which was a rockfall hazard slope and had performed slope remediation. Mr. Borden had been repeatedly qualified to testify in these types of cases (CP502).

In spite of Mr. Borden's extensive experience the trial court took a very simplistic approach essentially ruling that anything that was on the slope (like the rock fence) was outside Mr. Borden's area of expertise and he was not qualified to testify to it (RP 431):

> MR. HANEMANN: But I would ask to have you delete the words "rock fence." That's simply a protective device. We're going to use it to protect rocks from coming down on the road.
>
> THE COURT: Can I see the order?
>
> MR HANEMANN: Sure.
>
> THE COURT: Let me repeat again. I defined slope remediation as work that relates to the slope, and slope remediation includes these various devices that are listed here. How, you can have a rock fence that is not slope remediation in the way I am defining it. You could have it, for example, down the middle of the freeway. But if Mr. Borden is going to be asked to testify as to what should be done for this particular slope as a preventative measure that will require him to undergo some analysis of that slope and rock fence is part of then, then it might well be beyond his area of expertise. Okay?

(RP 431).

Mr. Borden testified immediately following this ruling. This ruling then morphed into an opinion by the trial court that Mr. Borden couldn't testify to the use of any protective devices.

> Q. (By Mr. Hanemann) Do you have an opinion whether or not it would have been appropriate to use one of these protective devices to protect motorists in that particular area?
> A. Yes.
> Q. And what is that opinion?
> A. I believe that since this remediation of the slope was being deferred –
>
> MS. TODD: Objection, Your Honor. I believe this goes beyond the scope of Mr. Borden's testimony. He's now getting into the field of geology and the practice license required in geology remediation.
>
> MR. HANEMANN: Simply repeating – he's not determining whether it should be deferred, Your Honor, which is a practice to geology. Mr. Badger's already testified it was deferred. It's in the material Mr. Borden has reviewed. Slope remediation has been deferred. That's not an issue in this case. He's simply testifying to a fact he knows about.
>
> THE COURT: The question he's being asked is whether in his opinion it would have been appropriate to use a protective device. That opinion is outside of his area of expertise. The objection is sustained.

(RP 447-448).

The determination that Slope 1867 was a high risk slope allowing rockfall to reach the road had been established by Mr. Badger, the State's

expert, before Mr. Borden was called to testify. Mr. Borden was asked by a hypothetical assuming that rocks the size of basketballs and footballs were reaching I-90 highway whether the protective device (the rockfall ditch) was adequate to insure motorist safety. An objection was made that the answer was outside Mr. Borden's expertise, the following exchanged occurred:

> MS. TODD: Objection, Your Honor. I believe this again gets into the field of geology and the risk associated with licensed geologists making those determinations, not highway engineers.
>
> MR. HANEMANN: Your Honor, this is a highway safety engineer. This is his field of expertise, probably more than it was Mr. Badger's. This is what he did for a living when he worked at DOT. This is what he's been testifying to as the last 15 years. He's got 40 years of experience as a highway safety engineer. In addition, Mr. Badger this morning said that the highway – the design manual is for highway engineers. That was his testimony. They take it and they take the information that's contained in there, including the information about designs of rockfall ditches, and they implement that and they use that on the – to make the roadways and determining whether the roadways are safe. That's what he does.
>
> THE COURT: The question asked him to express and opinion as to the degree of risk, and the degree of risk is presented by the slope adjacent to the highway. He's not qualified to express an opinion as to the degree of risk present by the slope.

MR. HANEMANN: That's not my question. I won't ask him the degree of risk represented by that slope.

THE COURT: To answer the question that you just asked him he would need to include in that some assessment of the risk presented by the slope. So the objection is sustained.

MR. HANEMANN: I'll rephrase.

Q. (By Mr. Hanemann) Same factual assumption: In your opinion as a highway safety engineer, based on your background again, your 40 years of training, your experience, do you have an opinion whether or not if rockfall is reaching the shoulder of the road and the lanes of travel in the highway whether or not the highway's being adequately protected?

MS. TODD: Objection, Your Honor. Same objection.

THE COURT: Same ruling. The objection is sustained. This witness is not qualified to express as opinion as to the degree of risk presented by the hillside.

MR. HANEMANN: And that's not what I'm asking, Your Honor.

THE COURT: But the questions you're asking require him to consider that. You're asking him if the devices were ade2uate. In order for him to determine if they're adequate, he has t decide what the risk was. Some devices would be adequate for some risks, not others. This witness is not able to make that analysis.

MR. HANEMANN: I'm asking him as his expertise as a highway safety engineer. I'm not asking him to tell us what the degree of risk this particular slope represents. I'm asking based on the fact that events are happening, whether or not [sic] that highway is being adequately protected.

> THE COURT: I'm aware of what you're asking him to answer is the same. The ruling is the same. The objection is sustained.

(RP 451-453).

In *Seybold v. Neu*, 105 Wn. App. 666, 19 P.3d, 1068 (2001) the Court of Appeals ruled it was reversible error to disqualify a doctor called to give his opinion as long as the physician has sufficient expertise to demonstrate familiarity with the medical problem at issue (*Seybold* at 680).

In *Palmer v. Massey-Ferguson, Inc.*, 3 Wn. App. 508, 476 P.2d 713 (1970), Division II held that a mechanical engineer with an interest in machine design could give an opinion that a machine was defectively designed even though he was not an agricultural engineer and the machine in question was a hay baler. The court stated "Any supposed deficiencies in his qualifications go to weight rather than admissibility of the evidence" (*Palmer* at 511).

A witness can be qualified as an expert based on experience: "The witness need not possess the academic credentials of an expert; practical experience is sufficient to qualify a witness as an expert. *State v. Smith*, 88 Wn.2d 639, 647, 564 P.2d 1154 (1977), overruled on other grounds, *State v. Jones*, 99 Wn.2d 735, 664, P.2d 1216 (1983). Expertise in a related field may also be sufficient to qualify an expert. Hall v.

Sacred Heath Medical Center, 100 Wash App. 53, 995 P.2d 621 (Div. 3 2000), as amended, (Apr. 6, 2000) (Physician qualified to testify regarding standard of care applicable to intensive care nurses).

In another example, a forensic toxicologist was qualified to testify at a rape trial as an expert on the effects of MDMA, commonly known as ecstasy, on humans, even though toxicologist did not have a degree in human physiology or pharmacology. *State v. Weaville*, 162 Wn.App 801 (2011).

The trial court deprived Mr. Borden's testimony of all vital force and content. The trial court went from ruling "But what I hear him saying is he's accepting the state's evaluation which apparently the state doesn't contradict, and based on that evaluation he's prepared to testify as to what could have been done to reduce the risk. It seems to me that's within his area of expertise" (RP 43-44), to consistently ruling that any testimony by Mr. Borden about protective devices was outside his scope of expertise.

A court's misapplication of ER 702 is error as a matter of law. Alternatively, even if one applies the abuse of discretionary standard, the court's reasons for extensively limiting Mr. Borden's testimony were unreasonable and require reversal. See *State v. Stenson*, 132 Wn.2d 668, 715, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). A court

abuses its discretion when its decision is based on untenable grounds or is manifestly unreasonable or arbitrary. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

4) **The Trial court erred in not admitting the Washington State Patrol's CAD log of a car/rock crash which occurred fifteen (15) hours before Ms. Helm's crash at the same location.**

An essential element of Plaintiff's burden of proof was notice to the State of rockfall and a reasonable opportunity to warn motorists of the unsafe condition.

Notice to the State of the rockfall issue at Slope 1867 was both long term and short term. The long term notice commenced in March, 2004 with the rock slide that impacted the westbound lanes of I-90 (See Badger e-mail, Exhibit 18, and Badger's testimony). The short term notice was the car/rock crash which occurred fifteen (15) hours before Ms. Helm's crash. Plaintiff would have contended this required the State to issue a warning on the reader board if Exhibit 15 had been allowed into evidence.

Plaintiff attempted to admit a certified copy of a CAD log (Ex 15) which provided a record of a rockslide which blocked traffic at milepost 58 westbound fifteen (15) hours before the Helm crash (RP 269). The trial court considered three reasons to deny admission of Exhibit 15; the WSP

CAD log: (1) authentication (RP 270), (2) whether it was hearsay (RP-270-271), and (3) whether it was relevant (RP 273-278).

Regarding authenticity, there is no question the document was authenticated. RCW 5.44.040 provides that certified copies of public records shall be admitted into evidence. Defense Counsel agreed it was certified. RCW 5.44.040 also overcomes a hearsay objection. RCW 5.44.040 states: "Copies of all records and documents on record or on file in the offices of the various departments of the United States and of this state or any other state or territory of the United States, when duly certified by the respective officers having by law the custody thereof, under their respective seals where such officers have official seals, shall be admitted in evidence in the courts of this state." It is an exception to the hearsay rule. See *State v. Monson*, 113 Wn.2d 833, 784 P.2d 485 (1989).

The court agreed Exhibit 15 was relevant but was concerned about the prejudicial effect that evidence had against the Defendant (RP 276). As the court explained, "this court previously ruled that other rockfall events, unless they are at the exact location, are not admissible under ER 403 because, although they might have some slight relevance to the danger presented here and the notice to the department, they're highly prejudicial because of the variability of the slopes across the pass" (RP 276).

ER 403 provides for the exclusion of relevant evidence only if it is substantially outweighed by the danger of unfair prejudice.

ER 403 is considered an extraordinary remedy, and the burden is on the party seeking to exclude the evidence to show that the probative value is substantially outweighed by the undesirable characteristics. *Carson v. Fine*, 123 Wn.2d 206, 867 P.2d 610 (1994). When the balance is even, the evidence should be admitted.

There is no question that the evidence of a prior rockfall event at the same location just fifteen (15) hours before the collision at issue in this case, had significant probative value in this case. The CAD log noted that the incident occurred at the "W90 SNOW SHED" at "W90 MP58". The same CAD log noted Tracy Helm's crash to have occurred at "W90 SNOW SHED at "W90 MP58." Slope 1867 is directly east of the snowshed on westbound I-90. The CAD log report of the location of the accident established that the rockslide that occurred just fifteen (15) hours before Ms. Helm's accident had occurred at the same location – Slope 1867. A prior rockfall so close in time is probative of the issue of notice to the State and the issue of whether the State had a duty to better protect the roadway and/or a duty to warn motorists.

The State argued in closing that it had insufficient notice of rockfall at the snowshed on Westbound I-90 because it was given only

four minutes' notice. Given this argument, Plaintiff was entitled to introduce the rockfall the night before. If evidence has been admitted on behalf of one party, similar evidence offered by the opposing party should not be excluded under Rule 403. Rule 403 requires "evenhandedness." See 5D Karl B. Tegland, Washington Practice: Courtroom Handbook on Evidence ch. 5, at 231 (2011-2012.

It was Plaintiff's contention that Tracy Helm should have been warned of falling rock before her crash. The State's witness Ms. McCoy, a Traffic Safety System's Officer for WSDOT, stated that she received notice from the State Patrol that there was a report of a rock in the road at 9:47 a.m. on November 6, 2006 (RP 254). The location was westbound between milepost 57 and 58 on I-90 (RP 254). Ms. Helm testified her crash was actually at MP 58.31 (RP 136-136). Ms. McCoy stated that after the report of the rock in the road, at 9:51 a.m., just four minutes later, there was a report of a "couple of disabled there" (RP 256).

Ms. McCoy then put up the variable message sign warning "watch for falling rocks." This was done because "there had been this incident with the rocks at the snowshed" (RP 260).

Ms. McCoy went on to testify that a Highway advisory radio announcement was released at 10:07 a.m. relating the danger of falling

rock to travelers because at that point "it became a known and verified hazard" (RP 264).

When the Plaintiff attempted to introduce Plaintiff's Exhibit 15, the CAD log showing an accident fifteen (15) hours earlier at the same location, that evidence was excluded as "prejudicial" by the court.

Exhibit 15 was clearly probative of the notice to Defendant's of an existing issue of rock impacting I-90 at Slope 1867. The court's failure to allow such evidence shows a lack of evenhandedness as contemplated by ER 403. The court allowed the Defendant's evidence about insufficient notice of rockfall to go to the jury. Plaintiff's evidence that the Defendant's notice occurred actually fifteen (15) hours earlier was relevant. The court's exclusion of Exhibit 15 was an abuse of discretion under these facts and was critical for Plaintiff to prove the State had notice of rockfall on I-90 not just 1-2 years earlier, but fifteen (15) hours before.

5) Cumulative Errors Require Reversal

The cumulative error doctrine applies when several errors occur at the trial court level to deny the defendant a fair trial, even though no single error alone warrants reversal. *State v. Hodges*, 118 Wn.App. 668, 673–74, 77 P.3d 375 (2003).

Plaintiff submits that the cumulative effect of the errors by the trial judge in this case warrants reversal. Plaintiff believes these errors are

reviewed by this court using the abuse of discretion standard. Was the trial court's ruling in each case untenable, manifestly unreasonable or arbitrary? These errors are as follows:

(a) The Trial court erred in not permitting Exhibit 13, Section 2 of the report to the Governor prepared by Tom Badger, to be admitted into evidence.

(b) The Trial court erred in not allowing his own report to be shown to Mr. Badger to refresh his memory.

(c) The Trial court erred in refusing to allow lay witness testimony regarding Plaintiff's condition prior to the accident.

(d) The Trial court erred in excluding photos of Plaintiff's activities as cumulative (Exhibits 24, 26, and 27) after Plaintiff had admitted only one photo (Plaintiff's Exhibit 25).

(e) The Trial court erred in admitting Jury Instructions Nos. 7, 8, 13, 15, 21 and 23 pertaining to comparative negligence.

(f) The trial court erred in admitting Jury instruction No. 12 pertaining to a superseding cause.

5 (a) Exhibit 13 was relevant and admissible.

The Trial court erred when it excluded Plaintiff's proposed Exhibit 13 because it is probative evidence of both the specific problems with Slope 1867, and the steps taken by the state to remedy other similar slopes in the I-90 corridor. Exhibit 13 is Section 2 of a Governor's Report entitled "Unstable-Slopes on I-90 Snoqualmie Pass: Re-assessment and Recommendations, January 2006" which was authored by Tom Badger. Mr. Badger was the State's expert witness. Mr. Badger testified he wrote the section on the I-90 corridor. Section 2 is entitled "2005 Re-assessment of Unstable Slopes between MP 36 and MP 68 on I-90 Snoqualmie Pass." Slope 1867 is discussed on page 41 of Exhibit 13. Plaintiff intended to introduce this exhibit to show two things: 1) that the state had notice that "rockfall impacts both westbound lanes numerous times per year," and 2) that other similar slopes had utilized fall protection devices like Jersey Barriers, rock fences, wider rock fall ditches and/or the combination of ditches and barriers. The effectiveness of these fall protection devices is set out in the Exhibit. Plaintiff's expert, Mr. Borden, was prepared to testify regarding the use of these safety measures. The trial judge ruled that Plaintiff's exhibit 13 was not relevant.

Evidentiary rulings are reviewed for abuse of discretion. *Davidson v. Municipality of Metro. Seattle*, 43 Wn.App. 569, 572, 719 P.2d 569

(1986). A trial court abuses its discretion when discretion is exercised on untenable grounds or for untenable reasons. *Davidson*, 43 Wn.App. at 572. Facts that tend to establish a party's theory or disprove an opponent's evidence are relevant and should be admitted. *Fenimore v. Donald M. Drake Constr. Co.*, 87 Wn.2d 85, 89, 549 P.2d 483 (1976). Excluding evidence that prevents a party from presenting a crucial element of its case constitutes reversible error. *Grigsby v. City of Seattle*, 12 Wn.App. 453, 457, 529 P.2d 1167 (1975).

Under ER 402 all relevant evidence is admissible. Relevance means that there exists a logical nexus between the evidence and the fact to be established, and the proffered evidence must tend to prove, qualify or disprove an issue. *State v. Peterson*, 35 Wn. App 481, 484, 667 P.2d 645 (1983). Exhibit 13 is relevant for both of the Plaintiff's purposes. Page 41 of Exhibit 13 explicitly discussed Slope 1867 and its history of numerous rockfall incidents, the protective measures that were currently in effect, and that future mitigation efforts were deferred. Likewise Exhibit 13 was proffered to show how the State protected other similar dangerous slopes. What protective measures the Defendant used to protect the roadway beneath other dangerous slopes is probative of the question of whether or not the State properly protected the roadway beneath Slope 1867.

5 (b) Refreshing Memory.

Prior to a writing being used to refresh the memory of a witness, the trial court must ensure that: (1) the witness's memory needs refreshing; (2) opposing counsel has the right to examine the writing; and (3) the trial court is satisfied that the witness is not being coached. *State v. McCreven* 170 Wn.App. 444, 284 P.3d 793 (2012), review denied 176 Wn.2d 1015, 297 P.3d 708.

The pertinent exchange was as follows:

> Q. (By Mr. Hanemann) Mr. Badger, do you remember whether or not the Slope 1867 in what area or section of the -- as you broke down the I-90 corridor, which section that was in?
> A. I'm sorry. I don't. . .
> Q. And you wouldn't be able to remember it unless you're able to consult the report you prepared?
> A. Correct.
> MR. HANEMANN: I would ask that he be allowed to refresh his memory, Your Honor.
> MS. TODD: Same objection, Your Honor.
> THE COURT: Same ruling. Sustained.

(RP 372-373).

The Judge's decision to sustain this objection was in error. Plaintiff's questions were merely foundational in nature. The objection sustained appears to have been for lack of relevance. However relevance only applies to the admissibility of a piece of evidence. Plaintiff's attorney was not attempting at that point to offer Exhibit 13 into evidence.

Rather, he was merely attempting to refresh a witnesses' memory concerning a fact that was contained within a document the witness had written himself.

5 (c) Lay witnesses may testify about their observations.

In this case, the trial court sustained an objection to a question by Plaintiff's counsel which asked a lay witness, Ms. Jo Sohneronne, a longtime neighbor and friend of the Plaintiff, whether the Plaintiff had ever complained about her back prior to the accident at issue (RP 463). The State objected on hearsay grounds and the court sustained the objection (RP 463).

Under ER 803(a)(3), an exception to hearsay is a statement describing the declarant's then existing pain, bodily condition, or health. As Karl Tegland notes, "the most common use of the rule is to introduce out of court statements describing pain and suffering in personal injury litigation and in prosecutions for assault and homicide." 5D Karl B. Tegland, Washington Practice: Courtroom Handbook on Evidence ch. 5, at 431 (2011-2012).

Plaintiff's attorney also asked Ms. Sohneronne the Plaintiff's next-door neighbor whether she had ever observed the Plaintiff "having any limitations with her back?" (RP 463). The State objected as follows:

MS. TODD: "Objection, Your Honor. I think that calls for expertise outside of what Ms. Sohneronne has expressed she has knowledge of and would be capable of testifying about. I think that gets into sort of medical testimony.

(RP 463).

The Plaintiff's attorney, in an attempt to rephrase the question then asked:

Q. (By Mr. Hanemann) Okay. Have you ever seen her have any issues with her back prior to this accident?

(RP 464).

The court still sustained the same objection. *Id.* So Plaintiff's attorney rephrased again:

Q. (By Mr. Hanemann) All right. Have you ever seen her have any physical problems? Are you aware of any physical problems that you may have observed personally prior to this event?"

(RP 464).

The State again objected and the court sustained an objection again.

THE COURT: "Same objection, same ruling. This witness can testify as to what she's observed. She can't express an opinion as to a medical issue, but she can testify as to what she personally has observed."

(RP 464).

These rulings are in error. The questions asked the witness to testify to what she observed. Lay witnesses may testify about matters

which they have personal knowledge of. Lay witnesses may testify to such aspects of physical disability of an injured person as are observable by their senses and describable without medical training. Physical movement by the injured person can be seen and described by a layman with no prior medical training or skill. See generally *Parris v. Johnson*, 3 Wn.App. 853, 859, 479 P.2d 91 (1970.

It was error to exclude Plaintiff's neighbor's testimony about what she witnessed.

5 (d) Plaintiff's Exhibits 24, 26 and 27 were not cumulative.

At trial, the court excluded Plaintiff's exhibit 27, a picture which portrayed the Plaintiff's children on a hike. However, foundational testimony had established that the Plaintiff had actually taken the picture. Exhibit's 24 and 26 similarly depicted activities the family had engaged in prior to the accident. The court excluded these apparently on both relevance grounds and as cumulative:

> "MR. DRURY: Your Honor, I'd move to admit Exhibit 27.
>
> THE COURT: And the relevance is?
>
> MR. DRURY: Just verifying the family was on a hike, Your Honor, prior to the accident.
> THE COURT: I'm not sure that that's an issue in dispute here. It seems cumulative and actually doesn't portray Ms. Helm.

MR. DRURY: Right. But the witness has indicated that she was behind the camera so that she's on the hike obviously.

. . .

MR. DRURY: Was there an objection on this one?

THE COURT: Yes. And counsel, I'd ask that you limit these exhibits to pictures of Ms. Helm if there are any."

(RP 489-490)

First, there was no objection to this evidence, as the record reflects. The court sua sponte excluded the evidence. Photographs are relevant if they tend to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. ER 401. These photographs were clearly relevant to the damages suffered by the Plaintiff, especially when the foundational testimony is considered along with the photographs. Furthermore, loss of enjoyment is a recognized element of damage in personal injury cases. *Kirk v. Washington State University*, 109 Wn.2d 448, 746 P.2d 285 (1987).

While Exhibits 24 and 26 were not offered, the Court had already sua sponte ruled on their admissibility before they had even been offered by requesting that Plaintiff's Counsel limit any further photographs to those actually depicting the Plaintiff.

The court ruled that the evidence was cumulative because testimony had already covered the same issue. "Cumulative evidence" is evidence which replicates other admitted evidence. *U.S. v. Ives*, 609 F.2d 930 (9th Cir. 1979), certiorari denied 100 S.Ct. 1283, 445 U.S. 919, 63 L.Ed.2d 605. The photographs were not cumulative. They each depict a different activity: Ex. 24 depicts the family camping; Ex. 26 depicts inner tubing and boating; and Ex. 27 depicts the family hiking. Certainly the jury should have been allowed to consider photographic corroboration of each of these activities.

5 (e) It was error to instruct the jury on comparative negligence in Instructions 7, 8, 13, 15, 21 and 23.

In order to prove contributory negligence, the State must prove all of the elements of negligence and proximate cause. *Webley v. Adams Tractor Co.,* 1 Wn. App 948, 949, 465 P. 2d 429 (1970).

In order to prove negligence the State has to show that the Plaintiff had a duty and breached it. The State failed to introduce any evidence of a duty. The State's theory, based on their proposed jury instructions was that Plaintiff (A) was traveling at an unsafe rate of speed by traveling too fast for conditions, (B) was not exercising ordinary care and placed herself or others in danger, or (C) was not paying attention. The only evidence arguably in support of the too fast for conditions was highway advisory

radio, Exhibit 83, which advised "A REDUCED SPEED IS REC[ommended] [in?] AREAS OF STANDING WATER."

The Plaintiff was (A) traveling below the speed limit, in the slow lane; (B) exercised ordinary care by traveling slower than traffic in the right lane and was attentive. The trial Court suggested Ms. Helm was not attentive because she didn't listen to the radio advisory.

Ms. Helm did not tune into the advisory radio and never heard the message. There was no duty on her party to tune into the advisory radio. However, the message was irrelevant to this case as the collision did not take place in an area of standing water. All six (6) instructions suggesting to the jurors Ms. Helm was at fault are erroneous and in toto constitute an abuse of discretion.

5 (f) It was an error of law to instruct the jurors on superseding cause.

If an independent intervening cause, can be deemed to supersede the defendant's original negligence. The defendant's original negligence cases to be the proximate cause. *Maltman v. Sauer*, 84 Wn.2d 975, 530 P.2d 254 (1975).

In this case, the Defendant argued that the plaintiff's apparent degenerative disk disease was a superseding cause (RP 654-655).

However, the question of whether the injury in this case was caused by degenerative disk disease or the accident is a question of causation.

A persuasive case from the New Mexico Court of Appeals, *Chamberland v. Roswell Osteopathic Clinic*, 130 N.M. 532, 27 P.3d 1019 (Ct.App.), rev. denied 130 N.M. 713, 30 P.3d 1147, probably best illustrates this point. In *Chamberland*, the patient went to Roswell Osteopathic Clinic while experiencing abdominal pain. He was diagnosed with a urinary tract infection and was prescribed antibiotics and pain killers. Ultimately, a urologist diagnosed appendicitis. Chamberland underwent surgery, but his appendix had already ruptured and created a large abscess.

When Chamberland sued the clinic for malpractice, the defendant asserted that appendicitis was not detectable during the time that the clinic's doctors treated Chamberland and the subsequent intervention of the appendicitis constituted an "independent intervening cause." *Chamberland*, 130 N.M. at 535, 27 P.3d 1019.

The *Chamberland* court determined that the dispute in its case "illuminate[d] the distinction between a true independent intervening cause and a mere dispute over causation in fact without an independent intervening cause." *Chamberland*, 130 N.M. at 537, 27 P.3d 1019. Only two scenarios were possible with respect to the patient's appendicitis—

either the appendicitis was present at the time the clinic's doctors examined him or it was not. If Chamberland's evidence showed the appendicitis was present and detectible through the exercise of ordinary care when he was examined at the clinic, it could be found liable for the injuries that followed. If, on the other hand, the appendicitis was not reasonably detectable at that point in time, then any negligence in the treatment of the patient's urinary tract infection could not have been the cause in fact of the abscess and other injuries. The New Mexico Court of Appeals concluded that "[n]either circumstance justifies an independent intervening cause instruction." *Chamberland*, 130 N.M. at 537, 27 P.3d 1019. Instead, the standard instruction on proximate cause was appropriate.

The same analysis applies to the instant case.

In this case, the cumulative effect of the above-cited evidentiary rulings had a material effect on the Plaintiff's ability to prove her case. Exhibit 13 included evidence by the State regarding the effectiveness of Jersey Barriers, rock catchment ditches, and other rockfall prevention devices utilized by the Defendant all along the I-90 Snoqualmie Pass corridor. The Plaintiff's expert, Mr. Borden, would have testified further regarding those devices and how they should have been used on the highway beneath Slope 1867. Such evidence was crucial to Plaintiff's

case to show that not only did the Defendant have notice of a rockfall issue on Slope 1867 but that it had used protective devices effectively to prevent rockfall from impacting the highway.

Further, establishing damages is a critical element in every personal injury case. The court's ruling to exclude more than one photograph depicting activities enjoyed by the Plaintiff prior to her accident deprived the jury of important evidence of damages. The photographs were properly offered evidence of the loss of enjoyment of life.

Similarly, the court's ruling to prohibit Ms. Sohneronne, the Plaintiff's longtime neighbor, from testifying about the physical problems of the Plaintiff or lack thereof negatively impacted the Plaintiff's ability to argue damages.

Finally, the instructions on superseding cause and contributory negligence were not supported by any evidence. All jury instructions must be supported by substantial evidence; it is prejudicial error to submit an issue lacking in such evidence to the jury. *State v. Fernandez–Medina*, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000).

Taken as a whole, these instances of error had the cumulative effect of materially affecting the ability of Plaintiff to prove her case. Cumulative error requires reversal.

F. CONCLUSION

The trial court erred as a matter of law in failing to exclude the State's discretionary immunity defense. The court allowed evidence from the State's expert witness regarding the deferred remediation and instructed the jury that the State was immune from liability.

The Plaintiff's expert, Mr. Borden, testified he was experienced, trained and had the requisite knowledge from working with all of the protective devices to provide safety to motorists on the highway. The exclusion of his testimony was error either as a matter of law for the misapplication of ER 702 or as an abuse of discretion.

Finally, Plaintiff's burden was to prove an unsafe condition existed and the State had notice of it (Instruction 25) (CP 97-127) and that there were interim solutions. The refusal of the trial court to allow Borden's testimony and Exhibits 12 and 15 regarding these issues was an abuse of discretion. Further, inserting comparative negligence by Plaintiff and superseding cause into seven (7) instructions to the jury had to confuse and mislead the jury even if they didn't actually address these issues in the Verdict Form.

Tracy Helm was deprived of a fair trial. This court should reverse the judgment and remand the case for a new trial. Cost on appeal should be awarded to Appellant.

Dated this 20th day of September, 2013.

Respectfully submitted,

JACK W. HANEMANN, P.S.

By _____
Jack W. Hanemann, WSBA #6609
Bradley J. Drury, WSBA #36909
Attorneys for Appellant

JACK W HANEMANN PS

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